REASONS FOR GRANTING THE PETITION

I

THE NINTH CIRCUIT SETS FORTH A TEST FOR THE APPLICATION OF RULE 32.2(A)(3) THAT CONFLICTS WITH THE TEST SET FORTH IN THE *SMITH* OPINIONS FROM THIS COURT AND THE ARIZONA SUPREME COURT.

This Court should grant review because the Ninth Circuit's opinion sets forth a legal test that conflicts with the test set forth in the *Smith* opinions from this Court and the Arizona Supreme Court regarding preclusion under Rule 32.2(a)(3), Arizona Rules of Criminal Procedure. The *Smith* opinions established a simple legal test for when an Arizona court will find a claim precluded in post-conviction-relief proceedings: (1) the claim has not been raised in previous state proceedings; and (2) the claim does not fall within the narrow category of legal rights that must be personally waived. Rather than following controlling authority mandating this "legal categorization" test, the Ninth Circuit announced a contrary test that is "fact-intensive" and opines that Arizona has "complex case law on waiver." App. A-16. Under the *Smith* opinions, the analysis is neither "fact-intensive" nor "complex." Under the proper test, a federal court would find that Cassett's due process claim would be found precluded if he returned to state court in a successive post-conviction proceeding. The Ninth Circuit ignores the test mandated by the *Smith* opinions and pronounces a new test contrary to the test mandated in those opinions.

In *Smith v. Stewart*, 241 F.3d 1191, 1195-96 (9th Cir. 2001), the Ninth Circuit found no procedural default of the asserted constitutional claim, holding that the state trial court's express application of Rule 32.2(a)(3) to the claim was not an independent state ground for denying relief. It held that an Arizona court's determination of whether a claim is of "sufficient constitutional magnitude" to require personal waiver constitutes an evaluation of the merit of a federal constitutional claim. 241 F.3d at 1197.

This Court granted certiorari, and then certified the following question to the Arizona Supreme Court:

> At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary, and intelligent waiver for purposes of Rule 32.2(a)(3), . . . [citation omitted] depend upon the merits of the particular claim, . . . [citations omitted], or merely upon the particular right alleged to have been violated, ...?

Stewart v. Smith, 534 U.S. 157, 159-60 (2001).

The Arizona Supreme Court answered the question as follows:

> We hold that at the time of respondent's third Rule 32 petition in 1995, the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Comment to 32.2(a)(3), depended not upon the merits of the particular claim, but rather merely upon the particular right alleged to have been violated.

Smith, 46 P.3d at 3. It noted that there is a narrow category of issues that require a personal waiver, but stated: "For all others, the State 'may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding.'" *Id.* at 9. Thus, "With some petitions, the trial court *need not examine the facts*." *Id.* at 12 (emphasis added). Therefore, if the right at issue "is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver, the claim is not precluded. If it is not of such magnitude, the claim is precluded." *Id.*

In view of the certified answer, this Court issued a per curiam opinion that overruled the Ninth Circuit's opinion, stating: "The Arizona Supreme Court's reply makes clear that Rule 32.2(a)(3) does not require courts to evaluate the merits of a particular claim, but only

to *categorize the claim*." *Stewart v. Smith*, 536 U.S. 856, 859 (2002) (emphasis added).

Despite the above, the Ninth Circuit made no attempt to categorize the claim, but said that was a matter for the state courts. Moreover, despite the Arizona Supreme Court holding that, for issues not falling into the category requiring personal waiver, "the trial court *need not examine the facts*," the Ninth Circuit proclaimed that the test is "*fact-intensive*." The Ninth Circuit thus failed to follow the holding of the highest Arizona state court on a matter of Arizona law. When the decision of a federal habeas claim turns on a state-law issue, the state's construction of its own law is binding on the federal court. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Furthermore, the Ninth Circuit failed to follow this Court's *Smith* opinion adopting the Arizona Supreme Court's holding and applying it to federal habeas proceedings.

Although there is a procedural distinction between *Smith* and this case, that distinction that does not lead to a different result. In *Smith*, the state trial court had *expressly applied a procedural bar* under Rule 32.2(a)(3), because that defendant had raised the claim in his first state petition for post-conviction relief. In the instant case, Cassett failed to present his due process claim in his first state petition for post-conviction relief, and raised it for the first time in his federal habeas petition.[2] But the test set forth in the *Smith* opinions applies, as a matter of law, to either situation. In this case, the federal court should simply employ the *Smith* test to determine whether the state court would find the claim precluded if presented in a successive state post-conviction petition. If so, the claim ~~is technically~~ exhausted, but procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The Ninth Circuit's analysis mandates the following delay in further federal and state court proceedings: (1) the district court stays the federal habeas proceeding; (2) the petitioner returns to state court to

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2. Cassett should not be in a better position than Smith for being dilatory in raising the issue.

file a successive state post-conviction proceeding, which will then be litigated in the state trial court and up to the state appellate courts; (3) after the state proceedings are concluded, the petitioner returns to federal court and files a motion for leave to file an amended petition to address the additional state proceedings; that motion is then litigated, and either denied or granted; (4) if the district court grants petitioner's leave to amend, the State files an amended answer and petitioner files an amended reply or traverse; and (5) the district court analyzes the claim for procedural default or on the merits.

Instead of casting the parties on this odyssey, the Ninth Circuit should have applied the simple categorization-of-claim test mandated by the *Smith* opinions.[3] Cassett's due process claim (constitutional error in admitting his statements to Sloss) would be found precluded by the Arizona trial court under the *Smith* test. It does not fall within the narrow category of issues that require personal waiver by the defendant, such as: (1) the right to counsel; (2) the right to jury trial; and (3) the Arizona right to a 12-person jury (applicable only to certain Arizona criminal trials). *Smith*, 46 P.3d at 9. The state trial court, as a matter of law, would find the claim waived/precluded under Rule 32.2 because:(1) it is not of sufficient constitutional magnitude as to require a personal waiver; and (2) Cassett did not raise it on appeal or in his previous state post-conviction proceeding. *See Smith*, 46 P.3d at 12.

The Ninth Circuit attempts to justify sending the legal question back to the district court and the state court as furthering "comity and federalism." App. A-16 (quoting *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) for the proposition that "Principles of comity and federalism counsel against substituting our judgment for that of the state courts...."). But the opinion denigrates comity and federalism by ignoring the legal standard mandated by the Arizona Supreme Court,

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3. The Ninth Circuit did not attempt to categorize the right, as required by the *Smith* opinions, but castigated the district court for not doing so. App. A-15. The Ninth Circuit did not hold that a personal waiver of the due process claim was required.

and subjecting Arizona's criminal bench to potentially endless waves of pointless collateral attack. *See Smith*, 46 P.3d at 11 ("Rule 32.2 is a rule of preclusion designed to limit those reviews, to prevent endless or nearly endless reviews of the same case in the same trial court."). *Cf. Roberts v. LaVallee*, 389 U.S. 40, 43 (1967) (per curiam) ("We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles."); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) ("Recognizing that 'each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference,' [citation omitted] . . . we must credit Arizona's choice.").

The Ninth Circuit's opinion also overlooks the futility of Cassett returning to state court because his successive petition would be found time-barred under Rule 32.4(a), Arizona Rules of Criminal Procedure (defendant must file a notice of post-conviction relief within 90 days after the entry of judgment and sentence, or within 30 days after the issuance of the order and mandate in the direct appeal, whichever is later). *See Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997) (recognizing untimeliness under Rule 32.4(a) as a basis for dismissal of an Arizona petition for post-conviction relief, separate from preclusion under Rule 32.2(a)); *Moreno v. Gonzalez*, 962 P.2d 205, 209 (Ariz. 1998) (timeliness is a separate inquiry from preclusion).

Finally, as in the *Smith* case, the Ninth Circuit ignored the State's request to certify the state-law issue to the Arizona Supreme Court. Such certification could have cleared up any possible remaining question about the legal categorization of claims that are of "sufficient constitutional magnitude" to require personal waiver under Rule 32. In *Smith*, this Court granted review, and then certified the issue to the Arizona Supreme Court. *See Smith*, 534 U.S. at 158.

The Ninth Circuit's opinion will result in petitioners swamping Arizona's criminal justice system with successive waves of meritless collateral attacks in criminal cases. Under the standardless Ninth Circuit test, federal district courts will be equally unable to forecast that

a third, fourth, or fifth state post-conviction proceeding would be futile because it will not be "clear that the Arizona courts would hold [the petitioner's] federal [claims] barred under Ariz. R. Crim. P. 32.2(a)(3)." App. A-16. This, despite the *Smith* opinions setting forth a clear legal test for analysis under Rule 32.2(a)(3).

The State asks this Court to grant certiorari review to reconcile the above conflicts, and ensure the Ninth Circuit's compliance with this Court's opinion in *Smith*.

II

THERE IS CONFLICT AND CONFUSION IN THE LOWER FEDERAL COURTS REGARDING WHEN SECTION 2254(B)(2) ALLOWS THEM TO DENY UNEXHAUSTED CLAIMS ON THE MERITS.

This Court should take review of this case to resolve a recurring issue of nation-wide importance: When does Section 2254(b)(2), allow a federal court to decide unexhausted claims on the merits? There are two sub-questions. First, whether the statute simply codifies *Granberry v. Greer*, 481 U.S. 129 (1987)? Second, even if the statute codifies *Granberry*, did the Ninth Circuit incorrectly interpret *Granberry* as forbidding a federal court from denying an unexhausted claim on the merits unless it is "perfectly clear" the applicant has failed to set forth a colorable claim. The Ninth Circuit's holding that Section 2254(b)(2) codifies *Granberry* conflicts with the broadly permissive language of the statute and the legislative history showing that Congress intended a change giving federal courts increased authority to deny unexhausted claims on the merits. The Ninth Circuit picked a restrictive example from *Granbery* as the test, rather than employing the much broader, more discretionary test that was set forth in *Granberry*, and employed in numerous other opinions from federal circuit courts outside the Ninth Circuit. The Ninth Circuit's narrow test also frustrates Congress' overall intent in enacting the AEDPA and its specific intent in enacting Section 2254(b)(2), instead making the subsection a virtual dead letter.

A. *Granberry and the AEDPA.*

Even before enactment of the AEDPA, this Court held that lower federal courts *could* deny non-meritorious claims, notwithstanding the petitioner's failure to exhaust them. *Granberry*, 481 U.S. at 135 n. 7. The exhaustion requirement is not jurisdictional and non-exhaustion is not "an inflexible bar to consideration of the merits of [a] petition . . . ." *Id.* at 131. This Court chose to adopt an "intermediate approach" whereby the federal court may "*exercise discretion in each case* to decide *whether the administration of justice would be better served* by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* (emphasis added). It instructed federal courts to:

> [D]etermine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim. If, for example, the case presents an issue on which an unresolved question of fact or of state law might have an important bearing, both comity and judicial efficiency make it appropriate for the court to insist on complete exhaustion to make sure it may ultimately review the issue on a fully informed basis. On the other hand, if is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will be well served .. . [if] the district court denies the habeas petition . . . .

Id. at 134-135. This Court also said that a federal court could *grant* habeas relief on an unexhausted claim, when necessary to avoid a miscarriage of justice. *Id.* at 135. Because the federal court of appeals held the state's non-exhaustion defense could not be waived, and made no attempt to determine "whether the interests of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so," this Court

vacated that court's judgment and remanded for further proceedings. *Id.* at 136.

The AEDPA added § 2254(b)(2), which provides:

> An application for a writ of habeas corpus *may* be *denied* on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(emphasis added.) Section 2254(b)(1) provides that an application cannot be *granted* unless the claim has been exhausted. Section 2254(b)(3) provides that a State does not waive the exhaustion requirement unless it expressly does so, through counsel.

B. *2254(b)(2) does not merely codify Granberry, in view of the subsection's language and its legislative history.*

The initial question is whether Congress enacted 2254(b)(2) merely to codify *Granberry*. The language of the statute and the legislative history show that it did not.

First, 2254(b) does not codify *Granberry* because a federal court can no longer *grant* relief on an unexhausted claim, but rather can only *deny* relief on an unexhausted claim. *See Aparicio v. Artuz*, 269 F.3d 78, 91 n.5 (2d Cir. 2001) (under the AEDPA, the federal court can deny an unexhausted claim but there is no complementary power to grant); *Mercadel v. Cain*, 179 F.3d 271, 276 (5th Cir. 1999) (same). *Cf. Granberry*, 481 U.S. at 135. The distinction makes sense because "when a federal court denies habeas relief on the merits for an unexhausted claim, concerns for comity are much less compelling than when it grants relief on such a claim." *Jones v. Jones*, 163 F.3d 285, 299 (5th Cir. 1998).

Second, Section 2254(b)(2) provides that the application "may be denied" not "may be denied if it fails to raise a colorable claim." This shows Congress' purpose of promoting the finality of state criminal

convictions. *See Rhines v. Weber*, 544 U.S. ___, 125 S. Ct. 1528, 1533-34 (2005); *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

Third, the legislative history shows that the subsection is not merely a codification of *Granberry*. The House Report[4] states:

> This *reform* will help avoid the *waste of state and federal resources that now result* when a petitioner presenting a *hopeless* petition to a federal court is sent back to the state courts to exhaust state remedies. *It will also help avoid potentially burdensome and protracted inquiries as to whether state remedies have been exhausted, in cases in which it is easier and quicker to reach a negative determination of the merits of the petition.*"

H.R. Rep. No. 104-23, at 9-10 (1995) (emphasis added). The report would not label the provision "reform" meant to avoid the consequences "that now result" if it intended a mere codification of existing case law. Although the somewhat ambiguous term, "hopeless" is better viewed as meaning "meritless" in light of the purpose of habeas reform. And the final sentence says nothing about the merits of a claim, but rather states that the purpose is to encourage federal courts to deny claims on the merits simply to avoid difficult exhaustion and procedural default issues. The courts would not need such encouragement if *Granberry* already allowed that. Thus, the Ninth Circuit's holding that the subsection codifies *Granberry* (and its misreading of *Granberry*, as argued below) are contrary to clearly-expressed legislative intent.

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4. The Ninth Circuit opinion cites the House Report regarding Congress' intent. App. A-17.

C. *Even if 2254(b)(2) simply codified Granberry, the Ninth Circuit's holding that Granberry establishes the "perfectly clear"/colorable claim test is contrary to Granberry itself, to other circuit court opinions, and Congressional intent.*

Even if the statute were simply a codification of *Granberry*, the Ninth Circuit takes the wrong standard from *Granberry*. *Granberry* set forth a broader, more discretionary balancing test that has been employed in numerous circuit court opinions outside the Ninth Circuit. The Ninth Circuit errs by taking an example as the test, rather than the actual test mentioned in *Granberry*.

Granberry instructs the lower federal courts to:

> [D]etermine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.

481 U.S. at 134-35. *Granberry* then sets forth two clear examples to illustrate when requiring exhaustion is improper and when it is proper. The first is when resolution of facts or an issue of state law is required; the second is when it is perfectly clear that the petitioner has not set forth even a colorable claim. *Id.* The Ninth Circuit erroneously adopts the second example as the test. It ignores *Granberry's* approving the federal courts' discretion to consider other facts such as judicial economy.[5]

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5. This Court has recognized that judicial economy is a good reason for deciding issues on the merits rather than requiring further proceedings below. For instance, in *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997), this Court held that judicial economy merited its analyzing the *Teague* issue when multiple procedural-bar issues involved analysis of state procedural laws that were better known to the district court and court of appeals).

Furthermore, the Ninth Circuit's opinion conflicts with opinions from other federal circuit courts employing the broader test set forth in *Granberry*. These opinions have cited judicial efficiency and the senselessness of further state and district court proceedings as cause for rejecting claims on the merits. *See, e.g., Miller v. Mullin*, 354 F.3d 1288, 1297-98 (10th Cir. 2004) (declining to address procedural default issue because case could be more easily and succinctly affirmed on the merits.).

The Fifth Circuit has noted that, even when the State has not waived exhaustion, federal courts have the "*discretion* in each case [under § 2254(b)(2)] to decide *whether the administration of justice would be better served* by insisting on exhausting or by reaching the merits of the petition forthwith." *Jones*, 163 F.3d at 299, *citing Granberry*, 481 U.S. at 131 (emphasis added). It ruled against Jones on the merits, notwithstanding his failure to exhaust state remedies. *Id. See also Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002) ("However, even where a claim is unexhausted and procedurally barred, we may deny the claim on the merits. 28 U.S.C. § 2254(b)(2) (2000)").

The Sixth Circuit, in *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003), cited *Lambrix* and then found that "the question of procedural default presents a complicated question of Michigan law and is unnecessary to our disposition of the case. We will therefore consider the merits of [the] claim." 351 F.3d at 216.[6]

The Seventh Circuit, in *Liegakos v. Cooke*, 106 F.3d 1381, 1388 (7th Cir. 1997), stated:

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6. As discussed above, the state procedural issue in this case is not complicated, when viewed under the *Smith* test. But, *assuming arguendo* that it was complicated, that would be a good reason, under *Granberry*, for the district court to decide the due process claim on the merits.

> A district court now may deny a claim despite lack of exhaustion, see § 2254(b)(2), but this is not what the district judge did. . . . [T]he claim cannot succeed on the merits under either Teague or the amended § 2254(d)(1), *so we can write finis to this litigation ourselves.*

(Emphasis added.)

The Tenth Circuit, while holding that the AEDPA codified *Granberry*, noted that "§ 2254(b)(2), standing alone, does not contain the standard for determining when a court should dismiss a petition on the merits instead of insisting on complete exhaustion, and decided to "read § 2254(b)(2) *in conjunction with Granberry*." *Hoxsie v. Kerby*, 108 F.3d 1239, 1242-43 (10th Cir. 1997) (emphasis added). It then concluded:

> [I]t is appropriate to address the merits of a habeas petition notwithstanding the failure to exhaust available state remedies where, as here, "the interests of comity and federalism will be better served by addressing the merits forthwith (quoting *Granberry*, 481 U.S. at 134).

108 F.3d at 1242. It further explained:

> The Supreme Court in *Granberry* reasoned that "if the court of appeals is convinced that the petition has no merit, a belated application of the exhaustion rule might simply require useless litigation in the state courts." [citation omitted]. As we shall explain, all of Hoxsie's claims are without merit.

108 F.3d at 1243.

Admittedly, two other circuits have held both that 2254(b)(2) codifies *Granberry* and that *Granberry's* test is whether "it is perfectly clear that the applicant does not raise even a colorable claim." *See Mercadel*, 179 F.3d at 276 n.4; *Lambert v. Blackwell*, 134 F.3d 506,

514-15 (3rd Cir. 1997). And the Second Circuit has apparently not adopted a clear standard either way. *See Turner v. Artuz*, 262 F.3d 118, 122 (2nd Cir. 2001) (under § 2254(b)(2), "A district court therefore now has the option of denying mixed petitions on the merits."). Thus, the federal circuit courts are beset by conflict and confusion regarding the *Granberry* test for resolving unexhausted claims on the merits.

The Ninth Circuit's opinion conflicts with this Court's pronouncement in *Granberry* that federal courts have discretion in denying unexhausted claims on the merits. Certainly, the Ninth Circuit's view of *Granberry* does not mesh with Congressional intent in enacting the AEDPA. Rather than furthering habeas reform, the Ninth Circuit mandates purposeless delay and litigation "by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim." *Granberry*, 481 U.S. at 134.

When a habeas petition lacks merit, the interests of comity and federalism, which underpin the exhaustion doctrine, are better served by having the federal court deny the petition on the merits. This is especially true when States generally have no objection to the federal court *denying* relief on the merits. Accordingly, the Ninth Circuit's expressed concern for federalism and comity rings hollow.

Furthermore, the extremely narrow "perfectly clear" standard makes the subsection a virtual dead letter. *See Lambert*, 134 F.3d at 515 (when 2254(b)(2) is viewed with the express waiver provision in 2254(b)(3), "it is doubtful that *Granberry* continues to have any import in a situation other than where the state has expressly waived the nonexhaustion defense.").

Only this Court can resolve the conflict and confusion apparent in the lower federal courts on how to apply Section 2254(b)(2). This Court should accept review to clarify the application of the statute, which affects state and federal habeas cases in every federal district court in this country. It should, at the very least, reassert *Granberry's* giving the lower federal courts broad discretion to deny unexhausted

claims on the merits. Such discretion does not offend comity, avoids federal courts having to deal with complicated issues of state law necessary to make exhaustion and procedural default findings, and avoids needless delay resulting from further litigation of constitutionally meritless claims.

CONCLUSION

Petitioners request this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gary Paul Cassett,	)	
Petitioner-Appellant,	)	No. 03-16573
	)	
v.	)	D.C. No.
	)	CV-97-00548-WDB
Terry L. Stewart, Director,	)	
Respondent-Appellee.	)	OPINION
	)	

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted April 26, 2005*
San Francisco, California

Filed May 3, 2005

Before: A. Wallace Tashima, Sidney R. Thomas, and
Richard A. Paez, Circuit Judges

Opinion by Judge Paez

*This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that under 28 U.S.C. § 2254(b)(2) of the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.

Appellant Gary Cassett, convicted in Arizona state court of multiple counts of child molestation and sexual conduct with a person under the age of 14, petitioned for a writ of habeas corpus in federal district court under § 2254. Among Cassett's contentions, which he had also raised in unsuccessfully seeking state post-conviction relief, was that the trial court violated his due process rights by allowing testimony that Cassett had pleaded guilty. The district court determined that this claim wa exhausted, but concluded that it could not determine from the record whether a constitutional violation had occurred. The state argued that Cassett had failed to properly raise the claim in state court and that the claim was procedurally defaulted. The district court concluded that there was sufficient cause to excuse any procedural default and ruled that the trial court's decision to allow the testimony and the subsequent revelation of the guilty plea was harmless error. The district court denied Cassett's habeas petition and denied Cassett's motion for reconsideration. On appeal, the court of appeals vacated the judgment and remanded to the district court with directions to dismiss the petition because Cassett failed to exhaust his federal due process claim in the Arizona state courts. On remand, the district court dismissed Cassett's habeas petition with prejudice because it concluded that the court of appeals failed to note that Cassett's claims had been procedurally defaulted in the state courts and were technically exhausted. Further, the district court ruled in the alternative that even if Cassett's claim was not exhausted, dismissal with prejudice was appropriate under § 2254(b)(2) because the district court had determined that the claim

was without merit. Accordingly, the district court denied Cassett's petition both as procedurally defaulted and on the merits.

Cassett appealed.

[1] Although lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate, and, under certain circumstances, an order issued after remand may deviate from the mandate if it is not counter to the spirite of the circuit court's decision. The district court's decision was neither foreclosed by nor counter to the spirit of the court of appeals' mandate in Cassett's prior appeal because the court of appeals did not specifically address the issue of procedural default, nor did it instruct the district court to dismiss Cassett's claim without prejudice. Thus, the district court did not exceed the scope of the court of appeals' mandate by dismissing Cassett's petition with prejudice.

[2] Under Arizona law, a claim that is of sufficient constitutional magnitude can only be waived knowingly, voluntarily, and intelligently. **[3]** If the right asserted is of sufficient constitutional magnitude to require personl waiver by the defendant and there has been no personal waiver, the claim is not precluded. **[4]** The district court did not address whether Cassett's claim was of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver, nor did it make any factual findings regarding whether Cassett waived his claim. The Arizona state courts were better suited to make these determinations. **[5]** Because it was not clear that the Arizona courts would hold Cassett's federal due process claim barred, it had to be concluded that his claim was not procedurally defaulted. The district court's procedural default ruling had to be reversed.

[6] Section 2254(b)(2) provides that an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. the Ninth Circuit had not adopted a standard for determining when it is appropriate to deny an unexhausted claim on the merits under § 2254(b)(2). Other courts, however, have held that § 2254(b)(2)

codifies a Supreme Court's decision that held that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.

[7] It could not be said that it was perfectly clear that Cassett failed to present a colorable federal claim. The Ninth Circuit has held that a state trial court's decision to allow evidence of a prior guilty plea violated the defendant's due process rights. It had to be held that the district court erred in dismissing Cassett's petition under § 2254(b)(2).

[8] The Ninth Circuit has recognized the appropriateness of a stay when valid claims would otherwise be forfeited. If the district court were to dismiss Cassett's entire habeas petition, he would be time-barred under the AEDPA's one-year statute of limitations from returning to federal court after attempting to exhaust his federal due process claim in the Arizona state courts. [9] The Supreme Court has held that when certain conditions are met, a district court must grant a petitioner's request for stay and abeyance. On remand, the district court would have to consider whether to stay the proceedings, hold in abeyance Cassett's exhausted petition, and dismiss without prejudice his unexhausted federal due process claim so that he could present it to the Arizona state courts.

COUNSEL

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Terry Goddard, Attorney General, Phoenix, Arizona; Kent E. Cattani, Chief Counsel, Capital Litigation Section, Phoenix, Arizona; Monica B. Klapper, Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for the respondent-appellee.

OPINION

PAEZ, Circuit Judge:

Petitioner Gary Paul Cassett ("Cassett") appeals from the district court's dismissal with prejudice of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In a previous appeal, we "remand[ed] to the district court with directions to dismiss the petition because Cassett failed to exhaust his federal due process claim in the Arizona state courts." *Cassett v. Stewart (Cassett I)*, 49 Fed. Appx. 154, 154 (9th Cir. 2002) (unpublished disposition). On remand, the district court dismissed Cassett's habeas petition *with prejudice* because it concluded that "the Court of Appeals failed to note that Petitioner's claims have been procedurally defaulted in the state courts and are technically exhausted." Further, the district court held in the alternative that even if Cassett's claim is not exhausted, dismissal with prejudice is appropriate under 28 U.S.C. § 2254(b)(2) because the district court "has determined that the claim is without merit." Accordingly, the district court denied Cassett's petition both as procedurally defaulted and on the merits.

In this appeal, Cassett argues that the district court exceeded the scope of our mandate by reaching the issue of procedural default and dismissing his habeas petition with prejudice. Cassett also argues that even if the district court did not violate our mandate, his claim is not procedurally defaulted because he never "knowingly, voluntarily, and intelligently" waived his right to raise it. Further, Cassett asserts that even if his claim is procedurally defaulted, he has demonstrated cause and prejudice excusing the default. Additionally, Cassett argues that the district court erred by alternatively denying his petition on the merits under 28 U.S.C. § 2254(b)(2) because it was not "perfectly clear" that he failed to raise a colorable federal claim. Finally, Cassett contends that the district court should stay the proceedings and hold his exhausted petition in abeyance while he attempts to exhaust his unexhausted federal due process claim in state court. We have jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291, 2253, and we reverse and remand.

We hold that the district court did not exceed the scope of our mandate in ruling on procedural default, that Cassett's federal due process claim is not procedurally defaulted because it is not clear that

the Arizona state courts would find this claim procedurally barred, and that the district court erred in dismissing Cassett's due process claim under 28 U.S.C. § 2254(b)(2) because it is not perfectly clear that this claim is not colorable. Finally, on remand, we direct the district court to consider Cassett's request that the court stay his habeas petition and hold his exhausted claims in abeyance while allowing Cassett to exhaust his federal due process claim in the state courts.

FACTUAL BACKGROUND

Cassett was charged with two counts of child molestation and four counts of sexual conduct with a person under the age of 14, stemming from events that occurred in November and December of 1990 with his stepson. Although Cassett agreed to plead guilty to kidnaping, a class two felony, at the change of plea hearing the trial judge found an insufficient factual basis for the plea, and the plea was never entered. Cassett's attorney hired John Sloss ("Sloss"), a criminal justice consultant, to prepare an alternative pre-sentence report, which revealed that Cassett had admitted to child molestation. Although the report was prepared to rebut the State's presentence report, Cassett believed that what he said to Sloss was confidential. Sloss, too, thought the report was protected by the attorney-client privilege.

Cassett pled guilty to attempted molestation and attempted sexual conduct with a minor because he believed this plea would allow the court to impose a probationary sentence. Prior to his sentencing hearing, Cassett's attorney disclosed the existence of Sloss's alternative pre-sentence report to the prosecutor because he planned to use it if necessary for rebuttal. However, the report was never presented to the court. Cassett was sentenced to two consecutive twelve-year terms.

Cassett's sentence was vacated after he alleged in a petition for post-conviction relief under Ariz. R. Crim. P. 32.1 that he was not informed that his sentences were to run consecutively. The case then proceeded to trial. During a pre-trial hearing, the State disclosed that it planned to call Sloss as a witness. Cassett's attorney filed a motion *in limine* to excluse Sloss's testimony, which the court denied.

Three trials were held in this case. The first ended in a mistrial after the jury learned of the plea and the prior sentencing. The second ended in a mistrial because the jury deadlocked. Sloss did not testify at either of the first two trials, but the State reserved him as a rebuttal witness during the second trial.

Prior to the third trial, the prosecutor informed Cassett's attorney that she intended to call Sloss as a witness in her case-in-chief. Cassett's attorney moved the court to preclude the State from calling Sloss as a witness. The trial court ruled that Sloss would be permitted to testify, but that his testimony would be limited to what Cassett said to Sloss. Cassett's attorney responded that this ruling "necessarily puts me in the position of having to open the whole issue of [the] plea agreement and sentencing" and noted on the record that he therefore would "approach it from that manner as a point of necessity given the Court's rulings."

Sloss testified during direct examination that Cassett told him he had pled guilty to oral sex with his stepson. Cassett's attorney elicited further information from Sloss on cross-examination regarding the guilty plea and the circumstances surrounding it. Cassett was convicted of two counts of child molestation and four counts of sexual conduct with a person under the age of 14. The trial court sentenced him to consecutive prison terms of 20 and 30 years and four life terms.

PROCEDURAL HISTORY

Cassett appealed his conviction to the Arizona Court of Appeals, arguing that (1) the trial court should have precluded Sloss from testifying about admissions Cassett made during the preparation of the pre-sentence report, under Ariz. R. Crim. P. 26.6(d)(2),[1] the purpose of which is to protect criminal defendants from self-incrimination, and that (2) the trial court abused its discretion when it denied Cassett's

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1. Ariz. R. Crim. P. 26.6(d)(2) provides that "[n]either a pre-sentence report nor any statement made in connection with its preparation shall be admissible as evidence in any proceeding bearing on the issue of guilt."

request for a one-day mid-trial continuance to locate and bring to court a defense witness.

While his appeal was pending, Cassett sought post-conviction relief in the trial court, alleging: (1) ineffective assistance of counsel based on (a) trial counsel's decision to present evidence of Cassett's prior guilty plea, (b) trial counsel's failure to interview a potential defense witness, and (c) previous trial counsel's disclosure of the existence of the pre-sentence report; and alleging (2) that the prosecutor engaged in misconduct by (a) intimidating potential defense witnesses, and (b) informing the jury of information contained in a document the court had ruled inadmissible. The trial court denied relief without an evidentiary hearing.

Cassett appealed the denial of post-conviction relief to the Arizona Court of Appeals, which consolidated his appeals and affirmed Cassett's convictions and sentences. The Court of Appeals ruled that: (1) the trial court did not err in admitting Sloss's testimony because Ariz. R. Crim. P. 26.6(d)(2) only applies to pre-sentence reports prepared pursuant to court order, not private pre-sentence reports; (2) the trial court did not abuse its discretion in denying a mid-trial continuance; (3)(a) trial counsel's decision to offer evidence about the plea negotiations was tactical and did not constitute unreasonable performance; (3)(b) Cassett was not prejudiced by his counsel's failure to interview a potential witness; and (4) Cassett was not prejudiced by any alleged prosecutorial misconduct. The Court of Appeals declined to consider Cassett's claim that his previous trial counsel rendered ineffective assistance by disclosing the existence of the pre-sentence report because it held that this claim was precluded under Ariz. R. Crim. P. 32.2(a)(3).[2] Cassett filed a petition for review with the Arizona Supreme Court, which denied review on October 31, 1996.

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2. Ariz. R. Crim. P. 32.2(a)(3) provides that a defendant "shall be precluded from relief under this rule based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding."

On September 2, 1997, pursuant to 28 U.S.C. § 2254, Cassett filed a habeas petition in the United States District Court for the District of Arizona, stating the following claims for relief: (1) the trial court violated Cassett's federal due process rights by allowing Sloss to testify that Cassett had pled guilty; (2) the trial court's denial of a mid-trial continuance to find and bring to court a defense witness violated Cassett's Sixth Amendment right to compulsory process; (3) Cassett received ineffective assistance of counsel because (a) his trial counsel elicited evidence that Cassett had pled guilty, (b) his counsel failed to interview a potential defense witness, and (c) his previous counsel disclosed the existence of the pre-sentence report; and (4) the prosecutor violated Cassett's Fifth Amendment rights by engaging in misconduct, including (a) intimidating potential defense witnesses and (b) informing the jury of information from an excluded document.

The State conceded that Cassett exhausted his state court remedies with regard to claims 2, 3(a), 3(b), 4(a), and 4(b). However, the State argued that Cassett failed to exhaust his remedies with regard to claim 1 (the trial court violated Cassett's due process rights by allowing Sloss to testify that Cassett had pled guilty), and that Cassett was procedurally barred under Ariz. R. Crim. P. 32.2(a)(3) from presenting claim 3(c) (Cassett's previous counsel rendered ineffective assistance by disclosing the existence of the pre-sentence report).

On April 2, 2001, the district court determined that claim 1 was exhausted because Cassett had alleged a violation of his right against self-incrimination under the Fifth Amendment in his opening brief before the Arizona Court of Appeals. Further, the district court agreed that Cassett failed to present claim 3(c) to the state court earlier and therefore procedurally defaulted this claim; however, the court held that Cassett had shown cause and prejudice excusing this default and therefore proceeded to review the merits of this claim.

The district court then denied claims 2, 3(b), 3(c), 4(a), and 4(b) on the merits. With regard to claim 1, the district court concluded that it could not determine whether a constitutional violation had occurred because the transcripts provided to the court omitted critical parts of the

record. For the same reason, the district court declined to rule on the merits of claim 3(a) (Cassett's counsel deprived him of effective assistance by eliciting evidence of his guilty plea), noting that while Cassett's lawyer's "decision may have crossed the line of competent advocacy," the court lacked "sufficient evidence at this time to consider fully" whether Cassett was prejudiced by this decision. Thus, the court ordered that a complete trial transcript be provided.

In a July 31, 2001 Order, after reviewing the full trial transcript, the district court addressed the merits of Cassett's due process claim. The court first noted that the State argued that Cassett had failed to properly raise the claim in state court and that the claim was procedurally defaulted. Although the district court previously had determined that Cassett exhausted this claim in state court, it concluded that there was sufficient cause to excuse any procedural default. The district court then held that the trial court's decision to allow Sloss's testimony and the subsequent revelation of the guilty plea was harmless error. Accordingly, the district court denied Cassett's habeas petition.

Cassett then moved for reconsideration of the court's order denying habeas relief. The State, too, filed a motion for reconsideration, disagreeing with the court's ruling that Cassett's procedural default was excused. The district court denied Cassett's motion for reconsideration, ruling again that the admission of Sloss's testimony regarding Cassett's vacated guilty plea was harmless error. The court also denied the State's motion for reconsideration, ruling that it properly reached the merits of Cassett's due process claim despite the State's contention that the claim was procedurally defaulted because "a recent Ninth Circuit decision appears to require this Court to assume that the state court reviewed the relevant federal constitutional law when it denied a rule 32 petition."[3] The court further noted that under 28 U.S.C.

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3. The district court cited to *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001), which held that federal habeas review of a claim was not barred despite an Arizona state court's ruling that the claim was precluded under Ariz. R. Crim. P. 32.2(a)(3). The *Smith* court held that because Arizona's preclusion rule requires an assessment (continued...)

§ 2254(b)(2), it may deny a habeas application on the merits notwithstanding the applicant's failure to exhaust remedies in state court.

Cassett appealed the district court's July 31, 2001 Order as well as the court's denial of his motion for reconsideration.[4] In *Cassett I*, we held that the district court erred in concluding that Cassett adequately exhausted his federal due process claim, and based on this error, improperly reached the merits of Cassett's claim." 49 Fed. Appx. at 155. We vacated the judgment and remanded with instructions that the district court dismiss the petition for failure to exhaust state court remedies. *Id.*

On remand, the district court dismissed Cassett's petition with prejudice, holding that (1) Cassett's claim was procedurally defaulted and was therefore technically exhausted, and (2) under 28 U.S.C. § 2254(b)(2) the petition should be denied even if it is not exhausted because the court "has determined that the claim is without merit." Cassett moved for an amendment of judgment, arguing that the district court failed to follow the Ninth Circuit's mandate in ruling on procedural default, that the district court erred in finding his due process claim procedurally defaulted, and that even if his claim was procedurally defaulted, Cassett demonstrated cause and prejudice

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3. (...continued)
of the "constitutional magnitude" of the claim, the state court's finding of preclusion was "necessarily intertwined" with an evaluation of the merits of petitioner's federal claim, and thus the state procedural ruling was not sufficiently independent of federal law to bar federal habeas review. *Id.* at 1197. the United States Supreme Court, after certification to the Arizona Supreme Court, *see Stewart v. Smith*, 534 U.S. 157, 159 (2001); *Stewart v. Smith*, 46 P.3d 1067, 1071 (Ariz. 2002), reversed the Ninth Circuit's ruling and held that under Arizona law, whether a claim is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver does not depend on the merits of the claim but rather on the particular right alleged to have been violated. *Stewart v. Smith*, 536 U.S. 856, 859-61 (2002).

4. The district court issued a certificate of appealability on the question "whether the admission of the testimony of the preparer of an alternative pretrial statement and the questioning of Petitioner's counsel improperly brought in Petitioner's prior guilty plea and created a due process violation."

excusing the default. Cassett also requested that the court stay his habeas petition and hold his exhausted claims in abeyance while allowing Cassett to exhaust his federal due process claim in state court. The district court, in a July 8, 2003 Order, denied Cassett's motion, stating that Cassett "fails to note that the Court has already determined, whether or not the claims were exhausted, that his claim is without merit as the error claimed of did not raise [sic] to the level of a denial of his Constitutional rights."

Cassett then requested a certificate of appealability, which the district court granted with respect to the following issues: (1) whether the petition for habeas relief should have been dismissed without prejudice for failure to exhaust, (2) whether Cassett was denied due process under the Fifth and Fourteenth Amendments based on the introduction at trial of a previously vacated guilty plea, and (3) assuming the application should have been dismissed without prejudice, whether the district court should have held the mixed petition in abeyance and allowed Cassett to exhaust his remedies in state court.

STANDARD OF REVIEW

We review de novo a district court's compliance with our mandate. *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). A district court's dismissal of a habeas petition based on procedural default is reviewed de novo. *Morrison v. Mahoney*, 399 F.3d 1042, 1045 (9th Cir. 2005). Dismissals of mixed petitions are reviewed de novo. *Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004).

I

Cassett first argues that the district court exceeded the scope of our mandate by dismissing his petition with prejudice. As noted, our memorandum disposition held that the district court erred in concluding that Cassett had exhausted his federal due process claim and therefore directed the district court to dismiss the petition for failure to exhaust. On remand, the district court concluded that Cassett's due process claim was procedurally defaulted and therefore "technically exhausted"

because Cassett would be procedurally barred from raising the claim in state court.[5] Accordingly, the district court dismissed his petition with prejudice.

[1] "[A]lthough lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate, and, under certain circumstances, an order issued after remand may deviate from the mandate . . . if it is not counter to the spirit of the circuit court's decision." *Kellington*, 217 F.3d at 1092-93 (alterations in original) (internal quotation marks and citations omitted). Here, the district court's decision was neither "foreclosed by" nor "counter to the spirit" of our mandate in *Cassett I* because we did not specifically

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5. The exhausting requirement is distinct from the procedural default rule.

> The exhaustion doctrine applies when the state court has never been presented with an opportunity to consider a petitioner's claims and that opportunity may still be available to the petitioner under state law. In contrast, the procedural default rule barring consideration of a federal claim applies only when a state court has been presented with the federal claim, but declined to reach the issue for procedural reasons, or if it is clear that the state court would hold the claim procedurally barred.

Franklin v. Johnson, 290 F.3d 1223, 1230 (9th Cir. 2002) (internal quotation marks and citations omitted). Thus, in some circumstances, a petitioner's failure to exhaust a federal claim in state court may *cause* a procedural default. *See Sandgathe v. Maass*, 314 F.3d 371, 376 (9th cir. 2002); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) ("A claim is procedurally defaulted 'if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991))).

"A habeas petitioner who has defaulted his federal claims in state court meets the *technical* requirements for exhaustion; there are no state remedies any longer 'available' to him. *Coleman*, 501 U.S. at 732 (emphasis added). A federal claim that is defaulted in state court pursuant to an adequate and independent procedural bar may not be considered in federal court unless the petitioner demonstrates cause and prejudice for the default, or shows that a fundamental miscarriage of justice would result if the federal court refused to consider the claim. *Id.* at 750.

address the issue of procedural default,[6] nor did we instruct the district court to dismiss Cassett's claim *without* prejudice. *See id.* at 1093 (holding that the "ultimate task is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not"). Thus, the district court did not exceed the scope of our mandate by dismissing Cassett's petition with prejudice.

II

Although the district court was within its discretion to address the issue of procedural default, we disagree with its resolution of this issue. The district court concluded that Cassett's federal due process claim is procedurally defaulted because he "may not return to State courts to present his claim."[7] Cassett argues that he is not barred from returning to state court because he did not waive his federal due process claim within the meaning of Ariz. R. Crim. P. 32.2(a)(3).

[2] Under Arizona Law, a claim that is "of sufficient constitutional magnitude" can only be waived "knowingly, voluntarily, and intelligently." *See* Ariz. R. Crim. P. 32.2(a)(3), cmt.[8] Whether a

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6. A district court may consider *sua sponte* the separate issue of procedural default. *See Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) ("[I]n cases where a claim has not previously been brought in state court, the district court must consider whether the claim could be pursued by any *presently available* state remedy.").

7. Cassett first asserts that he in fact previously "raised the issue of fundamental error caused by the introduction of the guilty plea at trial." However, in *Cassett I*, we held that Cassett never raised the *federal constitutional claim* that he has presented in his federal habeas petition. *See Cassett I*, 49 Fed. Appx. at 155 ("Nowhere in his Petition for Review filed with the Arizona Supreme Court does Cassett discuss Fourteenth Amendment due process or that the trial court denied him a fair trial in violation of his due process rights.").

8. Prior to 1992, Ariz. R. Crim. P. 32.2(a)(3) required that a defendant "knowingly, voluntarily, and intelligently" waive a claim before it was deemed precluded. In 1992, the Rule was amended to delete this language, and to provide that a defendant shall be precluded from relief on "*any* ground [t]hat has been waived

(continued...)

particular ground is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver depends on the particular right alleged to have been violated, rather than the merits of the claim. *Stewart v. Smith*, 46 P.3d 1067, 1070-71 (Ariz. 2002); *State v. Espinosa*, 29 P.3d 278, 280 (Ariz. Ct. App. 2001) (holding that knowing, voluntary, and intelligent waiver is required for "claims involving such constitutional rights as the right to counsel, the right to a jury trial, or the right to be tried by a twelve-person jury" (internal citations omitted)).

[3] If the right asserted "is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver, the claim is not precluded." *Stewart*, 46 P.3d at 1071. Determining whether a waiver is knowing, voluntary, and intelligent often involves a fact-intensive inquiry. *See, e.g., Johnson v. Lewis*, 929 F.2d 460, 462 (9th Cir. 1991) (holding that Rule 32.2(a)(3) preclusion did not apply where "the undisputed evidence showed (1) that [the petitioner] instructed his court-appointed appellate counsel to raise his federal constitutional claim in his direct appeal, and (2) that his attorney believed that he had raised the issue in the briefs filed on his client's behalf"); *Espinosa*, 29 P.3d at 280 ("[P]reclusion does not apply to claims involving certain constitutional rights *unless the record shows* that the defendant knowingly, voluntarily, and intelligently waived the right." (emphasis added)).

[4] Here, the district court did not address whether Cassett's claim is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver, nor did it make any factual findings regarding whether Cassett waived his claim. The Arizona state courts are better suited to make these determinations, which may require both a fact-intensive inquiry, and an application of Arizona's complex case

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8. (...continued)
at trial, on appeal, or in any previous collateral proceeding." (emphasis added). A comment to the Rule, however, makes clear that the knowing, voluntary, and intelligent waiver requirement still applies to claims of sufficient constitutional magnitude. Ariz. R. Crim. P. 32.2(a)(3), cmt.

law on waiver. *See Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) ("Principles of comity and federalism counsel against substituting our judgment for that of the state courts . . . .").

[5] Because it is not clear that the Arizona courts would hold Cassett's federal due process claim barred under Ariz. R. Crim. P. 32.2(a)(3), we conclude that his claim is not procedurally defaulted. *See Franklin*, 290 F.3d at 1230-31 (stating that a claim is procedurally defaulted only when a state court has been presented with the federal claim but refused to address it for procedural reasons, or when it is clear that the state court would hold the claim procedurally barred). We therefore reverse the district court's procedural default ruling.

III

The district court alternatively held that even if Cassett's federal due process claim is not exhausted, his petition should be dismissed with prejudice under 28 U.S.C. § 2254(b)(2) because the district court determined that the claim was without merit. Cassett argues that this alternative holding was in error. We agree.

[6] Section 2254(b)(2) of the Antiterrorism and Effective Death Penalty Act ("AEDPA") provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). The Ninth Circuit has not adopted a standard for determining when it is appropriate to deny an unexhausted claim on the merits under § 2254(b)(2). Other courts, however, have held that § 2254(b)(2) codifies the Supreme Court's decision in *Granberry v. Greer*, 481 U.S. 129, 135 (1987), which held that a federal court may deny an unexhausted claim on the merits where "it is perfectly clear that the applicant does not raise even a colorable federal claim." *See e.g., Jones v. Morton*, 195 F.3d 153, 156 n.2 (3d Cir. 1999) ("[Section] 2254(b)(2) is properly invoked only when it is perfectly clear that the applicant does not raise even a colorable federal claim. If a question exists as to whether the petitioner has stated a colorable federal claim, the district court may not consider the merits of the claim

if the petitioner has failed to exhaust state remedies." (internal quotation marks and citations omitted)); *Mercadel v. Cain*, 179 F.3d 271, 276 n.4 (5th Cir. 1999) ("[W]e cannot say that 'it is perfectly clear that the applicant does not raise even a colorable federal claim,' and denial of relief under § 2254(b)(2) is therefore inappropriate." (quoting *Granberry*, 481 U.S. at 129)); *Hoxsie v. Kerby*, 108 F.3d 1239, 1243 (10th Cir. 1997) (reading § 2254(b)(2) in conjunction with *Granberry* and noting that under *Granberry*, "if the court of appeals is convinced that the petition has no merit, a belated application of the exhaustion rule might simply require useless litigation in the state courts") (quoting *Granberry*, 481 U.S. at 133)).[9] We now join our sister circuits in adopting the *Granberry* standard and hold that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.

Adopting a standard that allows a federal court to deny relief on the merits of an unexhausted claim only when it is perfectly clear that the petitioner has no chance of obtaining relief comports with the legislative history of § 2254(b)(2). The House Report on the AEDPA explained that this provision "will help avoid the waste of state and federal resources that now result [sic] when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies." H.R. Rep. 104-23, 1995 WL 56412, at *9-10 (Feb. 8, 1995).

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9. In *Padilla v. Terhune*, 309 F.3d 614 (9th Cir. 2002), this court denied a habeas petition on the merits under 28 U.S.C. § 2254(b)(2) in the face of the State's argument that the petitioner's claim was not exhausted. The *Padilla* court, however, did not adopt a standard for when it is appropriate to deny an unexhausted claim on the merits. *See id.* at 620-21. Indeed, the court did not even address whether § 2254(b)(2) should be read in conjunction with *Granberry*. Under these circumstances, we do not view *Padilla* as foreclosing our consideration of the issue presented and decided here. *See United States v. Joyce*, 357 F.3d 921, 925 & n.3 (9th Cir. 2004) (holding that a prior panel's decision did not bind the present panel's consideration of an issue where in the prior decision "there is no indication that the defendant or the government brought this issue to the court's attention, nor is there any indication that the court explicitly considered or decided it").

Moreover, the principle of comity counsels in favor of a standard that limits a federal court's ability to deny relief under § 2254(b)(2) to circumstances in which it is perfectly clear that the petitioner has no hope of prevailing. A contrary rule would deprive state courts of the opportunity to address a colorable federal claim in the first instance and grant relief if they believe it is warranted. *See Rose v. Lundy*, 455 U.S. 509, 515 (1982) (noting that "as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act"); *see also Mercadel*, 179 F.3d at 277 ("[T]he concern for comity weighs more heavily when it appears that a state prisoner's claim has arguable merit than when it is easily dismissed as frivolous by a federal court, thus saving a state court from needless and repetitive litigation.").

[7] We conclude that the district court erred in denying Cassett's petition on the merits under § 2254(b)(2). Cassett alleged that his due process rights were violated when his vacated guilty plea was revealed to the jury. Although we do not express a view on the merits of Cassett's federal due process claim, we cannot say that it is perfectly clear that he failed to present a colorable federal claim. The Supreme Court has held that a withdrawn guilty plea is inadmissible to prove guilt in federal court. *Kercheval v. United States*, 274 U.S. 220, 223-25 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. . . . We think the weight of reason is against the introduction in evidence of a plea of guilty withdrawn."); *see also Canizio v. New York*, 327 U.S. 82, 87 n.2 (1946) (reaffirming *Kercheval*'s holding that a withdrawn guilty plea is not admissible as evidence of guilt in federal court). Likewise, in *Standen v. Whitley*, 994 F.2d 1417, 1422 (9th Cir. 1993), we held that a state trial court's decision to allow evidence of a prior guilty plea violated the defendant's due process rights, stating that "[a] fair trial cannot be had if the jury must weigh with all the other evidence, pro and con, the one overwhelming piece of evidence: the defendant pleaded guilty." Thus, we hold that the district court erred in dismissing Cassett's petition under § 2254(b)(2).

IV

[8] Because Cassett's federal habeas petition was filed after the AEDPA's effective date of April 24, 1996, the one-year statute of limitations applies to Cassett's petition. *See Woodford v. Garceau*, 538 U.S. 202, 207 (2003). Although Cassett's petition was timely when it was originally filed, over eight years have passed since the Arizona Supreme Court denied review. *See* 28 U.S.C. § 2244(d)(1) (stating that the statute of limitations begins running from the date of the final judgment of a state court). Therefore, if the district court were to dismiss Cassett's entire habeas petition, he would be time-barred under the AEDPA's one-year statute of limitations from returning to federal court after attempting to exhaust his federal due process claim in the Arizona state courts.

[9] The stay-and-abeyance procedure adopted in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), avoids this procedural dilemma. In *Kelly*, we recognized "the clear appropriateness of a stay when valid claims would otherwise be forfeited." *Id.* at 1070. We therefore ordered the district court to consider staying the petition to permit the petitioner to exhaust his unexhausted claims and then add them by amendment to his stayed federal petition. *Id.* In *Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005), the Supreme Court recently held that when certain conditions are met, a district court must grant a petitioner's request for stay and abeyance. Cassett requested that the district court stay his petition and hold his exhausted claims in abeyance while he attempted to exhaust his federal due process claim in the Arizona state courts. The district court, however, did not address Cassett's request. Accordingly, on remand, the district court is instructed to consider, consistent with *Rhines*, whether to stay the proceedings, hold in abeyance Cassett's exhausted petition, and dismiss without prejudice his unexhausted federal due process claim so that he can present it to the Arizona state courts.[10]

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10. We note one additional matter relating to the district court's dismissal of Cassett's habeas petition. When it reached the merits of Cassett's due process claim, (continued...)

REVERSED AND REMANDED.

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10. (...continued)
the district court noted that all of Cassett's other claims already had been dismissed. It appears from the record, however, that one of his claims remained unresolved.

In its April 2, 2001 Order, the district court dismissed five of Cassett's seven claims on the merits. At that time, the court refrained from ruling on two of Cassett's claims: his due process claim (claim I), and his claim that he was denied effective assistance when his lawyer elicited evidence of his guilty plea (claim 3(a)). The court noted that it could not yet reach a determination regarding harmless error for the due process claim or prejudice for the ineffective assistance claim because the trial transcript provided to the court was incomplete.

However, after reviewing the full trial transcript, the district court in its July 31, 2001 Order only addressed the due process claim. The court then dismissed Cassett's petition in its entirety without ruling on his remaining ineffective assistance claim. It is unclear whether the district court intended its July 31, 2001 Order to dispose of Cassett's ineffective assistance claim in addition to his due process claim. Thus, on remand, the district court should clarify its ruling with respect to Cassett's ineffective assistance claim.

APPENDIX B

FILED
Aug 04 2005
Cathy A. Catterson,Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY PAUL CASSETT,	) No. 03-16573
	)
Petitioner - Appellant,	) D.C No. CV-97-00548-WDB
	) District of Arizona,
v.	) Tucson
	)
TERRY L. STEWART, Director,	) ORDER
	)
Respondent - Appellee.	)
	)

Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges.

The panel has unanimously voted to deny Appellee's petition for panel rehearing. The petition for panel rehearing is therefore DENIED. The full court has been advised of Appellee's petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Judge Thomas and Judge Paez voted to deny the petition for rehearing en banc, and Judge

Tashima recommended that it be denied. Therefore, the petition for rehearing en banc is also DENIED.

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No. 05-723 NOV 1 - 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DORA SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,
PETITIONER,

-vs-

GARY PAUL CASSETT,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX C

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District of Arizona
By s/_____Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GARY PAUL CASSETT,	)	No. CIV 97-548-TUC-WDB
	)	
Petitioner,	)	**ORDER**
	)	
vs.	)	
	)	
TERRY L. STEWART, et al.,	)	
	)	
Respondent.	)	
	)	

Presently before the Court is Gary Paul Cassett's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254 ("Petition").

I. BACKGROUND

Gary Paul Cassett ("Petitioner") was indicted on December 27, 1990, on two counts of child molestation and four counts of sexual conduct with a person under 14. These incidents occurred in November and December, 1990, with his stepson.

Petitioner was originally represented by attorney Larry Lingeman. Petitioner agreed to plead guilty to kidnaping, a class two felony. However, at the change of plea hearing the plea was withdrawn, because the trial court believed the factual basis was insufficient. In preparation for sentencing, attorney Lingeman hired John Sloss to

prepare an alternative presentence report, which contained admissions of child molestation, for use in rebuttal to the State's Report. Although the report was prepared with the intention of giving it to the court, Petitioner claims he believed what he told Sloss was confidential, and Sloss allegedly believed his report was protected by the attorney-client privilege.

Petitioner was next represented by attorney Robert Barrasso. On August 23, 1991, Petitioner pled guilty to attempted molestation of a child and attempted sexual conduct with a minor. He claims he did so because this plea made probation available. Prior to an October 4, 1991, sentencing hearing, Barrasso disclosed the existence of the Sloss alternative pre-sentence report to the prosecutor, Eric Larsen, because he planned to use it if necessary for rebuttal. Barrasso did not introduce the Sloss pre-sentence report at sentencing. Cassett was sentenced to twelve years on each count, to run consecutively.

In a Petition for Post-Conviction Relief filed on June 29, 1992, Petitioner claimed he was not informed by Barrasso that the sentences would run consecutively. On September 21, 1992, Appellant's plea was vacated and attorney Harold Higgins was appointed to represent Petitioner at trial. During a pretrial hearing, the state disclosed it was going to call Sloss as a witness. Higgins filed a motion *in limine* to exclude Sloss's testimony, which was denied.

Three trials were held in this case. The first ended in a mistrial after the jury learned of the plea and prior sentencing. The court declared a mistrial in the second, after the jury deadlocked. Sloss did not testify at either of these trials, although he had been reserved as a rebuttal witness for the second trial.

At the third trial, the prosecutor informed the court she was going to call Sloss as a witness in her case in chief. In response, Higgins claimed that this put him in the difficult position of having to open the issue of the plea agreement and sentencing, as well as considerations that went into Petitioner's decision to enter into a plea and make the admissions in the alternative report. Sloss testified and, on direct

examination, stated Petitioner told him he had pled guilty to oral sex with his stepson. Higgins elicited additional testimony regarded the guilty plea and the circumstances surrounding it during his cross-examination. Petitioner was convicted of two counts of child molestation and four counts of sexual conduct with a person under the age of 14. the trial court sentenced Petitioner to consecutive prison terms of 20 and 30 years and four life terms.

Petitioner appealed to the Arizona Court of Appeals and, while the appeal was pending, he requested post-conviction relief in the trial court. The trial court denied his petition for post-conviction relief without an evidentiary hearing. He also appealed the trial court's denial of his petition. The two appeals were consolidated, and the Arizona Court of Appeals affirmed the conviction and sentences. The Arizona Supreme Court denied his petition for review.

II. PETITIONER'S CLAIMS

Petitioner claims the following as grounds for habeas corpus relief:

1. The state's use of testimony from the alternative presentence reporter (Sloss) denied Petitioner's rights to due process;

2. The denial of a one-day mid-trial continuance to locate and bring to court a defense witness denied petitioner his right to compulsory process;

3. Ineffective assistance of counsel for the following reasons:

    a. Petitioner received ineffective assistance of counsel (Higgins) when counsel informed the jury that Petitioner had previously pled guilty;

b. Petitioner's counsel was constitutionally ineffective for not interviewing a potential defense witness;

c. Petitioner's counsel (Barrasso) in his plea agreement was constitutionally ineffective for disclosing the private presentence report;

4. Misconduct by the prosecutor which resulted in violations of his Fifth Amendment rights:

a. Petitioner was denied due process by prosecutor's intimidation of potential defense witnesses; and

b. Petitioner was denied due process by prosecutor informing jury of information included on an excluded document.

The State concedes Petitioner has exhausted his state court remedies with regard to claims 2, 3(a), 3(b), 4(a), and 4(b). The State argues that Petitioner has failed to exhaust his state remedies in relation to the due process violation asserted in claim 1. Although the Arizona Court of Appeals discussed claim 1 in relation to Rule 26.6(d)(2) of the Arizona Rules of Criminal Procedure in its Memorandum Decision (February 27, 1996), Petitioner alleged that it was also a violation of his right against self-incrimination under the Fifth Amendment in his opening brief on appeal. Accordingly, the claim has been exhausted and is properly before the Court.

The state also argues Petitioner is precluded from presenting claim 3(c) because he failed to present it to the state court consistent with state procedural rules. *See* Memorandum Decision (February 27, 1996), Ex. H to Answer at 4 n.1 ("The claim that appellant's previous trial counsel was ineffective is precluded and has not been considered," citing Ariz. R. Crim. P. 32.2(a)(3)). A Petitioner may be barred from presenting a claim because of procedural default if he's failed to present

it in state court consistent with state procedural rules. Federal habeas relief is generally unavailable if the procedural default rests upon adequate and independent state grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If adequate and independent state grounds exist, federal habeas review is only available if the Petitioner can demonstrate cause for the procedural default and actual prejudice, or show that the failure to grant habeas review will result in a "fundamental miscarriage of justice." *Id.* at 750. Cause exists if an objective factor external to the defendant or his counsel prevented them from complying with the state's procedural rules. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Actual prejudice exists if the alleged errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). There is a fundamental miscarriage of justice only where the petitioner makes a colorable showing of factual innocence. *Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

The procedural default in this case rests on adequate and independent state grounds. Thus, Petitioner must have demonstrated cause for the procedural default and actual prejudice, or show that the failure to grant review will result in a "fundamental miscarriage of justice." Petitioner argues that the claim was not properly raised earlier because it did not exist at the time of his first petition. Although the report had been disclosed by that time, Petitioner claims he had not consented to, and was not aware of, its disclosure. More importantly, there had been no trial and Sloss had not been suggested as a state witness. The deprivation of a constitutional right arguably had not yet occurred. Thus, there was sufficient cause to excuse the procedural default. We also find actual prejudice in that the testimony of Sloss seemed to be the critical difference between the hung jury in the second trial and the conviction in the third trial.

II. STANDARD OF REVIEW

Because this Petition was filed in September of 1997, it is subject to the Antiterrorism and Effective Death Penalty Act signed on

April 24, 1996. Thus, habeas corpus relief may not be granted unless the underlying conviction resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal Law or resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence." Thus, we must consider whether the alleged grounds for relief fall under either of the two exceptions to § 2254(d).

III. DISCUSSION

A. Statements to Private Presentence Report Writer

Petitioner contends he was denied due process when the trial court allowed the preparer of a private presentence report to testify about statements Petition made to him during preparation of the report. He argued in his state appeal that the statements should have been excluded as violative of Ariz. R. Crim. P. 26.6(d)(2) and his right against self-incrimination. The court of appeals addressed the procedural issue, determined the rule was applicable only to presentence reports prepared pursuant to a court order under Rule 26.4, and found no error. The applicability of Rule 26.2(d)(2) involves an interpretation of state law, and federal habeas corpus courts must defer to a state court's determination of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). However, we must also examine Petitioner's claim as a violation of due process.

The state argues that the admission of a defendant's incriminating statement where there is no proof of coercive police conduct does not constitute a due process violation, citing *Colorado v. Connelly*, 479 U.S. 157 (1986). However, when the admission of the statement results in the admission of a prior guilty plea, a due process violation may exist.

The Ninth Circuit Court of Appeals has held that where there has been the improper admission of a guilty plea, harmless-error analysis is appropriate. *Standen v. Whitley*, 994 F.2d 1417, 1423 (9th Cir. 1993). The test applied in such a situation considers whether the trial

error "had substantial and injurious effect of influence in determining the jury's verdict." *Id.* The Ninth Circuit has stated that this review "requires the most painstaking examination of the record and the most perceptive reflections as to the probabilities of the effect of the error on a reasonable trier of fact." *Id.* (internal citations omitted).

In *Standen*, the court of appeals held that the trial court's allowance of evidence concerning the prior plea of guilty had substantial and injurious effect on the jury's verdict. The trial court allowed the prosecution, in response to defendant's argument that the police had failed to properly investigate and had destroyed evidence, to tell the jury that because the defendant had plead guilty it was not necessary to retain the evidence or further investigate. Although the court instructed the jury that they should not consider the plea alone, the court did tell the jury that the withdrawn guilty plea was part of the evidence against the defendant.

On the evidence before the Court now, the situation in Petitioner's trial does not appear to be as egregious. The prosecution called Mr. Sloss to testify during the second day of trial. On cross-examination, attorney Higgins asked Mr. Sloss about the situation. Sloss stated that there was "criminal legal matter pending." Higgins then asked him to clarify, to which he responded that Petitioner had pled guilty to two counts in a plea agreement, and that previously there had been six or seven counts filed against Petitioner. The prosecution then objected to how far afield the witness was going from his own scope of knowledge. The topic was again discussed when Petitioner testified. Petitioner explained that he agreed to plead guilty because he was told it was very difficult to defend against charges of molestation and because he was told that if he plead guilty he would be probation eligible and able to provide for his family and be able to see his other son. The prosecution did not cross-examine the Petitioner on the plea. The guilty plea and its place as evidence was not addressed in the trial court's instructions to the jury.

It is not entirely clear, however, if the prosecutor ever alluded to or discussed the guilty plea and its evidentiary effect. The transcripts

provided to this Court do not contain the opening and closing arguments and are missing approximately fifty pages that contained the prosecution's direct examination of Mr. Sloss. As a result, it is not possible at this time for the Court to make the necessary "painstaking examination of the record" and determine whether a due process violation has occurred.

B. Denial of a Continuance to Obtain Presence of a Witness

At the end of the first week of trial, after the state rested, the defense was unable to call Mike Garcia because he failed to appear. The defense had talked to him several times that week, and he had agreed to be present on Friday. Defense counsel unsuccessfully tried to contact him over the weekend. On Monday, after Petitioner had testified, Mr. Garcia had still not appeared. The court issued a warrant and tried to reach him by phone but was unsuccessful. Defense counsel requested a delay until the next day to try to obtain Mr. Garcia's presence, but stated he would stipulate to Mr. Garcia's testimony if required to do so. Pursuant to a stipulation, Mr. Garcia's testimony was read to the jury.

The denial of a continuance to secure the attendance of a witness traditionally lies within the sound discretion of the trial court. *State v. Bishop*, 667 P.2d 1331 (Ariz. App. 1983). However, the Supreme Court has also recognized the right of a defendant to offer witnesses and compel their presence as constitutionally protected. *Washington v. Texas*, 388 U.S. 14, 19 (1967) (relying on due process and the Sixth Amendment). Thus, under certain circumstances, denial of a continuance to enable a defendant to exercise his right may be a denial of due process.

The Court of Appeals for the Fifth Circuit has identified a number of factors a court should consider in determining whether or not a defendant has been denied his right of compulsory process and due process when a request for a continuance is denied. These include: the diligence of the defense in interviewing witnesses and procuring their presence; the probability of procuring their testimony within a

reasonable time; the specificity with which the defense is able to describe their expected knowledge to be favorable to the accused; and the unique or cumulative nature of the testimony. *Hicks v. Wainwright*, 633 F.2d 1146, 1149 (5th Cir. 1981) (quoting *United States v. Uptain*, 531 F.2d 1281, 1287 (5th Cir. 1976). *See also State v. Reynolds*, 597 P.2d 1020, 1021 (Ariz. App. 1979) (seven factor test).

In applying these factors to the case at bar, we find no indication that the defense was not diligent in interviewing or procuring the presence of Mr. Garcia. The defense subpoenaed him and personally served him. Also, the testimony was not cumulative in nature when compared with the testimony of other witnesses.

However, it is doubtful that the defense would have been successful in procuring his presence within a reasonable period of time. Despite several phone conversations the week before and the issuance of a subpoena, Mr. Garcia failed to appear on Friday of that week and a witness was thus called out of order. He apparently evaded phone calls from defense counsel over the weekend, and from the court on Monday when he again failed to appear. There is no indication in the record that defense counsel would have been successful in procuring Mr. Garcia's presence the next day if a continuance had been granted. Defense counsel even conceded he had no "clue" whether or not Mr. Garcia would appear on Tuesday. *See* Trial Tr. (August 16, 1993), Ex. S to Answer at 39. Furthermore, although favorable in nature, Mr. Garcia's testimony provided Petitioner with an alibi for only part of the day on which one of the alleged incidents occurred. *Id.* at 47-48. Petitioner was apparently not with Mr. Garcia the entire day, and testimony from other witnesses indicated the alleged incident could have occurred during the part of the day that they were not together. It was thus not directly contradictory to the other evidence presented. Given the specificity with which defense counsel was able to present Mr. Garcia's expected testimony, we find that the trial court's denial of a continuance was not contrary to, or an unreasonable application, of federal law.

C. Ineffective Assistance of Counsel Claims

Strickland v. Washington, 466 U.S. 668, 687 (1984), sets forth a two part test for establishing constitutionally ineffective assistance of counsel. The defendant must show (1) that counsel's representation did not meet an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for counsel's error, the result would have been different. *Id.* at 687-696.

A court must be "highly deferential" in judging counsel's performance. *Id.* at 689. It "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id.*, citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

In determining whether counsel's errors resulted in the required prejudice, a court must decide "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. In making such a determination, a court deciding an ineffectiveness claim "must consider the totality of the evidence before the judge or jury," taking into account that "a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 695-696. The Supreme Court has further refined the prejudice inquiry to focus on "whether the result of the proceeding was fundamentally unfair or unreliable," not just an analysis of outcome determination. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

Applying this test and giving due deference to counsel's performance, we find that Petitioner has failed to show how his counsel was constitutionally ineffective for failing to interview a potential defense witness. To the contrary, the record demonstrates that testimony by Randy McBride as to the victim's credibility would have been cumulative.

As to attorney Barrasso's decision to disclose the existence of the alternative presentence report, the Court finds that the attorney's conduct was not outside the scope of competent practice. Candor with the court and with the other side is required, and the use of an alternative pre-sentence report without having disclosed it, would have been a breach of ethics. That the report was not used at that time, does not change this fact.

However, attorney Higgin's decision to explain the existence of the alternative report by eliciting evidence of the guilty plea is a more difficult consideration. While the Court will not question most strategic decisions made by counsel, and Petitioner is bound by his counsel's strategic decisions, "counsel's strategy cannot be held to have acted as a waiver of [Petitioner's] right to fair trial by jury." Standen, 994 F.2d at 1422. Thus, Higgin's decision may have crossed the line of competent advocacy. The Court must then determine whether the Petitioner was prejudiced by his counsel's actions. As noted in the discussion of whether the admission of the guilty plea constituted a violation of the Petitioner's due process rights, the Court is without sufficient evidence at this time to consider fully this question.

D. Prosecutorial Misconduct

Petitioner claims that the state engaged in prosecutorial misconduct when it prevented the defense from being present at witness interviews. He also presented affidavits from two witnesses in his Petition for Post-conviction Relief which avowed that the prosecutor had spoken to them in a rude manner. The Arizona Court of Appeals could find no support for this claim of prosecutorial misconduct in the record.

Petitioner also claims that the state engaged in misconduct when, during cross-examination of Petitioner, it informed the jury about a help-line volunteer's conclusions contained on an intake form. The volunteer apparently reached her conclusions after talking to Petitioner on the help-line. The trial judge had previously ruled that the form itself was inadmissable. The Court of Appeals found no prejudice because "the prosecutor's reference to the 'indication of incest and